



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### MEMORANDUM

TO: Members of the Working Group on Compiling Administrative Records  
FROM: Jeremy Graboyes  
DATE: March 11, 2020  
RE: Instructions for Adding Materials to Rulemaking Records

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This Memorandum provides briefing materials in advance of the March 11, 2020, meeting of the Working Group on Compiling Administrative Records. It covers issues related to how personnel should add materials to rulemaking records during the course of informal rulemaking proceedings. I provide the information in this memorandum for background purposes only. It does not necessarily represent the views of ACUS, the Working Group, or its members.

The information in this Memorandum is based primarily on Administrative Conference of the United States (ACUS) Recommendation 2013-4,<sup>1</sup> Leland Beck's 2013 consultant report to ACUS,<sup>2</sup> and rules and guidance materials previously developed by the following agencies:

- Department of the Interior (DOI);<sup>3</sup>
- Environmental Protection Agency (EPA);<sup>4</sup>
- Food and Drug Administration (FDA);<sup>5</sup>
- Internal Revenue Service (IRS);<sup>6</sup> and
- National Oceanic and Atmospheric Administration (NOAA).<sup>7</sup>

Many principles in these guidance documents appear to originate in guidance issued by the Department of Justice in 1999<sup>8</sup> and subsequently republished in the *U.S. Attorneys' Bulletin*.<sup>9</sup>

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<sup>1</sup> Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013), <https://www.acus.gov/recommendation/administrative-record-informal-rulemaking>.

<sup>2</sup> Leland E. Beck, *Agency Practices and Judicial Review of Administrative Records in Informal Rulemaking* (May 14, 2013) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/publication/agency-practices-and-judicial-review-administrative-records-informal-rulemaking-report>.

<sup>3</sup> Dep't of the Interior, *Standardized Guidance on Compiling a Decision File and an Administrative Record* (June 27, 2006), <https://www.nps.gov/features/foia/Standardized-Guidance-on-Compiling-and-Administrative-Record.pdf> [hereinafter DOI Guidance].

<sup>4</sup> ENVTL. PROTECTION AGENCY, *ADMINISTRATIVE RECORDS GUIDANCE* (Sep. 2011), <https://www3.epa.gov/ogc/adminrecordsguidance09-00-11.pdf> [hereinafter EPA Guidance].

<sup>5</sup> 21 C.F.R. § 10.40(g).

<sup>6</sup> INTERNAL REVENUE MANUAL pt. 32, <https://www.irs.gov/irm/part32> (last visited Sep. 27, 2019) [hereinafter IRS Guidance].

<sup>7</sup> Nat'l Oceanic & Atmospheric Admin., *Guidelines for Compiling an Agency Administrative Record* (Dec. 21, 2012), [https://www.gc.noaa.gov/documents/2012/AR\\_Guidelines\\_122112-Final.pdf](https://www.gc.noaa.gov/documents/2012/AR_Guidelines_122112-Final.pdf) [hereinafter NOAA Guidance].

<sup>8</sup> U.S. Dep't of Justice, *Env't. & Nat. Res. Div., Guidance to Federal Agencies on Compiling the Administrative Record* (1999), [https://environment.transportation.org/pdf/programs/usdoj\\_guidance\\_re\\_admin\\_record\\_prep.pdf](https://environment.transportation.org/pdf/programs/usdoj_guidance_re_admin_record_prep.pdf).

<sup>9</sup> See Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. ATTY. BULL. 7 (Feb. 2000), <https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4801.pdf>.

## **BACKGROUND**

In Recommendation 2013-4, ACUS recommended that agencies that engage in informal rulemaking should issue publicly available guidance to aid personnel in implementing the best practices set forth in that Recommendation.<sup>10</sup> Among those best practices, ACUS recommended that agency personnel “begin compiling rulemaking records no later than the date on which an agency publishes the notice of proposed rulemaking” and “continue compiling the rulemaking record as long as the rule is pending before the agency.”<sup>11</sup> The rulemaking record is an internal agency record. It is distinct from the public rulemaking docket and the administrative record for judicial review, both of which are made available outside the agency.<sup>12</sup>

At its first meeting, the Working Group largely focused on what constitutes the period of a rulemaking and when during that period agency personnel should take steps to compile a record of rulemaking materials.<sup>13</sup> At its second meeting, the Working Group addressed which materials personnel should add to rulemaking records.<sup>14</sup> At its third meeting, for which this Memorandum provides background, the Working Group will discuss the processes by which personnel should create and maintain the rulemaking record, add materials to the rulemaking record, and preserve the rulemaking record after the rulemaking period.

ACUS encouraged agencies to address the “preservation” of rulemaking records and the “relevant capabilities and limitations of recordkeeping tools and technologies” in guidance on compiling administrative records.<sup>15</sup> Specifically, the Conference recommended that agencies should direct agency personnel to “deposit rulemaking record materials with the [designated] custodian(s), excepting if necessary confidential information to which access is restricted.”<sup>16</sup>

This Memorandum delves deeper into the processes by which agency personnel create, compile, and preserve contemporaneous rulemaking records. It also examines best practices for explaining those processes in agency policies. Specifically, the Memorandum addresses the following topics:

- designating the record custodian;
- creating and maintaining the rulemaking record;

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<sup>10</sup> Recommendation 2013-4, *supra* note 1, ¶ 11.

<sup>11</sup> *Id.* at ¶ 4.

<sup>12</sup> Admin. Conf. of the U.S., Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013), <https://www.acus.gov/recommendation/administrative-record-informal-rulemaking>.

<sup>13</sup> October 29, 2019 Meeting of the Working Group on Compiling Administrative Records, Admin. Conf. of the U.S. (Dec. 27, 2019), <https://www.acus.gov/meetings-and-events/event/october-29-2019-meeting-working-group-compiling-administrative-records> [hereinafter Oct. 29 Report]; Memorandum from Jeremy Graboyes to Members of the Working Group on Compiling Administrative Records (Oct. 16, 2019), <https://www.acus.gov/memorandum/timing-compilation-and-indexing-practices> [hereinafter Oct. 16 Memo].

<sup>14</sup> January 15, 2020 Meeting of the Working Group on Compiling Administrative Records, Admin. Conf. of the U.S. (Mar. 11, 2019), <https://www.acus.gov/meetings-and-events/event/january-15-2020-meeting-working-group-compiling-administrative-records> [hereinafter Jan. 15 Report]; Memorandum from Jeremy Graboyes to Members of the Working Group on Compiling Administrative Records (Dec. 27, 2019), <https://www.acus.gov/memorandum/components-and-exclusions-rulemaking-records> [hereinafter Dec. 27 Memo].

<sup>15</sup> Recommendation 2013-4, *supra* note 1, ¶ 11.

<sup>16</sup> *Id.* at ¶ 5.

- preparing materials for the rulemaking record;
- submitting materials to the rulemaking record;
- labeling rulemaking record materials;
- organizing the rulemaking record;
- indexing the rulemaking record;
- segregating sensitive information in the rulemaking record;
- closing the rulemaking record; and
- preserving the rulemaking record.

Agencies may wish to consider these topics and address them in policies on compiling administrative records. The Working Group should also consider whether additional topics warrant discussion.

### **DESIGNATING THE RECORD CUSTODIAN**

ACUS recommends agencies direct personnel to “deposit rulemaking record materials with the [designated] custodian(s), excepting if necessary confidential information to which access is restricted.”<sup>17</sup> Agencies may wish to consider clarifying the following in policies on compiling administrative records: (a) responsibilities of a record custodian, (b) characteristics of an appropriate custodian, and (c) the method for selecting an appropriate custodian.

#### **Responsibilities of a Record Custodian**

At a minimum, Recommendation 2013-4 envisions the custodian as the official who receives rulemaking materials from other personnel and maintains those materials in a central record. Custodians may be responsible for any number of discrete tasks, including:

- creating the rulemaking record;
- coordinating rulemaking record compilation throughout the rulemaking process;
- managing access to the rulemaking record, especially where the record is maintained electronically;
- digitizing non-electronic materials;
- storing and safeguarding rulemaking-related objects;
- compiling and organizing the rulemaking record;
- labeling, tagging, or adding metadata to rulemaking materials;
- indexing the rulemaking record;
- handling and safeguarding classified or other protected information;
- identifying which documents may belong in the rulemaking record;<sup>18</sup>
- documenting the recordkeeping process;
- answering questions from and coordinating with personnel during the rulemaking process;

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<sup>17</sup> *Id.*; see also Beck, *supra* note 2, at 44.

<sup>18</sup> NOAA Guidance, *supra* note 7, at 5, 7–8.

- managing the public rulemaking docket, which may include receiving, screening, and uploading public comments;
- coordinating or consulting with agency attorneys during the rulemaking process;<sup>19</sup>
- closing the rulemaking record;
- coordinating the end of rulemaking record compilation;
- answering questions from and coordinating with agency or Department of Justice attorneys in the event of litigation;<sup>20</sup>
- coordinating the compilation of the administrative record for judicial review;<sup>21</sup>
- certifying the administrative record for judicial review or making declarations about its preparation;<sup>22</sup>
- responding to relevant Freedom of Information Act requests;
- ensuring compliance with the Federal Records Act and other recordkeeping requirements;
- ensuring the rulemaking record is preserved after the rulemaking and any litigation has concluded.

Agencies may wish to explain custodians’ specific responsibilities in policies on compiling administrative records, for the benefit of custodians as well as others who participate in agency rulemaking processes.

### **Characteristics of an Appropriate Record Custodian**

Record custodians must be able to fulfill those responsibilities the agency assigns to them. Relevant qualifications and other characteristics may include:

- “access to relevant documents;”<sup>23</sup>
- the ability to “identify which documents belong in the [record];”<sup>24</sup>
- “significant drafting and analytical responsibility for the action;”<sup>25</sup>
- an individual “substantially involved in the merits of the matter;”<sup>26</sup>
- the ability to effectively coordinate with rulemaking personnel and other agency officials, such as General Counsel’s Office attorneys;<sup>27</sup> and
- if relevant, clearance to handle classified or other sensitive information.

Agencies should consider the minimum qualifications expected of custodians and may wish to address them in policies on compiling administrative records. Agencies may also wish to consider best practices for training custodians.

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<sup>19</sup> DOI Guidance, *supra* note 3, at 3.

<sup>20</sup> NOAA Guidance, *supra* note 7, at 5, 12.

<sup>21</sup> DOI Guidance, *supra* note 3, at 5–8, 10; NOAA Guidance, *supra* note 7, at 12–13.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> DOI Guidance, *supra* note 3, at 3.

<sup>24</sup> NOAA Guidance, *supra* note 7, at 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

Alternatively, agencies could encourage subcomponents to develop their own selection criteria. For example, NOAA Guidance permits individual offices to develop their own, context-specific guidelines for “identifying the agency employee who is likely to be the most well-suited to serve as the Custodian for any given decision-making process.”<sup>28</sup>

### **Selecting an Appropriate Record Custodian**

Agencies have adopted two main approaches to select a qualified custodian. Under the first, a central office functions as the default custodian in rulemaking proceedings. FDA regulations, for example, designate the agency’s Division of Dockets Management as the centralized repository for rulemaking materials.<sup>29</sup> At least with respect to administrative records for judicial review, DOI Guidance also permits program offices to “seek the logistical assistance of the Department’s Document Management Unit, in the Office of the Executive Secretariat.”<sup>30</sup>

Under the second approach, an official in the component with primary responsibility for developing a rule designates or serves as the custodian. DOI and NOAA guidance, for example, assign custodial responsibilities to a program manager, project manager, or staff person with access to the rulemaking materials<sup>31</sup> or “substantial” involvement in the rulemaking.<sup>32</sup> The IRS Manual charges the “drafting team” with creating and compiling the legal file.<sup>33</sup> More complicated questions arise when multiple components share responsibility for developing a rule<sup>34</sup> or when multiple agencies jointly develop a rule.<sup>35</sup>

Some agencies permit either approach according to the circumstances of the rulemaking. EPA guidance states, for example, that the “lead program office for the action in question” develops and maintains the record at agency headquarters, while a “central record coordinator” serves the same role at certain regional offices.<sup>36</sup>

## **CREATING AND MAINTAINING THE RULEMAKING RECORD**

The Working Group has so far considered the “rulemaking record” as a theoretical concept. This section considers what, in more concrete terms, constitutes the rulemaking record.

There is relatively little public information on the actual nature of what agencies consider to be the rulemaking record. DOI Guidance refers to the decision file as a “collection of

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<sup>28</sup> *Id.*

<sup>29</sup> See 21 C.F.R. §§ 10.20, 10.30(i), 10.40(g).

<sup>30</sup> DOI Guidance, *supra* note 3, at 5.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> NOAA Guidance, *supra* note 7, at 5.

<sup>33</sup> IRS Guidance, *supra* note 6, at § 32.1.2.1(1).

<sup>34</sup> See EPA Guidance, *supra* note 4, at 11.

<sup>35</sup> See NOAA Guidance, *supra* note 7, at 3; see also Admin. Conf. of the U.S., Recommendation 2012-5, *Improving Coordination of Related Agency Responsibilities*, 77 Fed. Reg. 47,810 (Aug. 10, 2012).

<sup>36</sup> EPA Guidance, *supra* note 4, at 11.

documents” that should “be kept in an accessible location.”<sup>37</sup> The Internal Revenue Manual defines the contents of a “legal file” but not its form.<sup>38</sup>

In the past, the rulemaking record was often a physical folder or “a box with a bow.”<sup>39</sup> Alongside a broader shift to e-government, agencies appear to increasingly rely on electronic recordkeeping. Nevertheless, Beck found that, as late as 2013, “[m]ost agencies maintain[ed] elements of rulemaking records in paper and in electronic form.”<sup>40</sup>

Among agencies that do maintain electronic rulemaking records, agencies rely on a wide range of management tools and techniques, “from simple file saving on a shared drive to a dedicated electronic records management system.”<sup>41</sup> Some agencies use electronic document management systems originally “designed for more general recordkeeping purposes and adapted for rulemaking record use.”<sup>42</sup> Some tools are specially designed, whereas others are off-the-shelf. At its first meeting, Working Group members noted agencies’ use of less formal tools, such as Excel spreadsheets and SharePoint libraries.

A variety of factors likely determine an agency’s choice of recordkeeping tool, including:

- the availability of resources to purchase or develop a more robust recordkeeping system and the need for such as system;
- the existence of other agency electronic recordkeeping systems which the agency can modify for rulemaking purposes;
- the complexity of typical agency rulemaking proceedings;
- the degree to which typical rulemaking proceedings are centralized in a single office or dispersed across multiple offices or agencies;
- the level of security required for rulemaking records;<sup>43</sup>
- the volume of materials in typical agency rulemaking proceedings;
- the form of typical rulemaking materials;
- the likelihood of future litigation;
- the number of individuals who manage or need access to rulemaking records; and
- the skillset and technological capacity of individuals who manage or need access to rulemaking records.

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<sup>37</sup> DOI Guidance, *supra* note 3, at 4.

<sup>38</sup> See IRS Guidance, *supra* note 6, § 32.1.2.1.

<sup>39</sup> Beck, *supra* note 2, at 44.

<sup>40</sup> *Id.* (citing responses from the Federal Deposit Insurance Corporation, Department of Homeland Security, Department of Veterans Affairs, Merit Systems Protection Board, National Oceanographic and Atmospheric Administration, Mine Safety and Health Administration, Employee Benefits Security Administration, Employment and Training Administration, Wage and Hour Division, Patent and Trademark Office, Department of the Treasury, Department of Justice, and Federal Trade Commission.)

<sup>41</sup> *Id.* at 45.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

The Working Group may wish to consider these and other factors agencies should consider when selecting an appropriate tool for creating and maintaining rulemaking records. Principles applicable to other e-government applications may also be helpful.<sup>44</sup>

### **PREPARING MATERIALS FOR THE RULEMAKING RECORD**

At its second meeting, the Working Group considered how agency personnel should determine which materials belong in the rulemaking record.<sup>45</sup> This section addresses the steps personnel take to prepare appropriate materials for inclusion in the rulemaking record.

The subsections below explore issues related to preparing items in the following categories for inclusion in rulemaking records:

- print publications;
- printed images, photographs, and maps;
- electronic text-based documents;
- digital images, photographs, and maps;
- webpages;
- digital data files and databases;
- computer models and data analysis programs;
- emails;
- personal notes;
- audiovisual materials;
- oral communications;
- objects; and
- internal workflow materials.

Although the Working Group was generally hesitant to provide guidelines specific to particular categories of rulemaking materials,<sup>46</sup> it may wish to consider whether category-specific guidelines are more appropriate in this context given.

When developing instructions, agencies may wish to consider factors such as the form of the rulemaking record, staff resources and time constraints, the allocation of responsibilities between rulemaking personnel and record custodians, the volume and length of rulemaking materials, and the degree to which typical rulemaking proceedings are centralized in a single office or dispersed across multiple offices or agencies.

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<sup>44</sup> See, e.g., Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018); Admin. Conf. of the U.S., Recommendation 2011-8, *Agency Innovations in E-Rulemaking*, 77 Fed. Reg. 2264 (Jan. 17, 2012); Admin. Conf. of the U.S., Recommendation 2011-1, *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

<sup>45</sup> See generally Mar. 11 Report, *supra* note 14.

<sup>46</sup> *Id.*

## **Print Publications**

Print publications range from single pages to multi-volume treatises. Agencies may wish to address how personnel should prepare print publications for rulemaking records. In particular, agencies may wish to consider:

- the form in which personnel transmit print publications (e.g., originals, photocopies, digital copies in a standardized file format such as PDF<sup>47</sup>);
- the scope of the transmittal (e.g., publications in their entirety, relevant excerpts); and
- whether a suitably detailed citation will suffice in certain situations (e.g., voluminous publications, standardized publications, widely available publications).<sup>48</sup>

## **Printed Images, Photographs, and Maps**

Many of the same principles that apply to print publications will also apply to printed images, photographs, maps, and other visual materials. Agencies may wish to specifically address how personnel should prepare oversized materials and other materials that are not easily reproduced or digitized for rulemaking records.

## **Electronic Text-Based Documents**

Rulemaking personnel may encounter electronic documents in a variety of formats, including Word, PDF, plain text, and rich text. Each format has its own strengths and weaknesses. Agencies may wish to address how personnel should prepare electronic text-based documents for rulemaking records (e.g. transmitting files in their original format or converting them to a standardized format such as PDF<sup>49</sup>).

## **Digital Images, Photographs, and Maps**

Digital images, photographs, and maps come in a variety of file formats, including JPG, GIF, BMP, TIF, PNG, GIS, and many others. Each format has its own strengths and weaknesses. Agencies may wish to add how personnel should prepare digital images, photographs, and maps for rulemaking records (e.g. transmitting files in their original format or converting them to a standardized format).

## **Webpages**

Websites are susceptible to link and reference rot. Because the rulemaking record should reflect those materials actually considered during the rulemaking process, it is insufficient to merely record the uniform resource locator (URL) of a consulted webpage. As Beck puts it, “[t]imely preservation is necessary because web pages and specific content may be evanescent and post-decision capture may be impossible.”<sup>50</sup>

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<sup>47</sup> See Beck, *supra* note 2, at 45.

<sup>48</sup> See NOAA Guidance, *supra* note 7, at 7–8.

<sup>49</sup> See Beck, *supra* note 2, at 45.

<sup>50</sup> *Id.* at 49.

Agencies may wish to address how personnel should preserve webpages for rulemaking records. In particular, agencies may wish to consider:

- the form in which to preserve webpages (e.g., downloading web files in their original file format, saving them in a standardized file format such as PDF, or generating “hard copy printouts”<sup>51</sup>); and
- metadata to include with preserved webpages (e.g., URL, date accessed).

<b>Agency</b>	<b>Guidance</b>
DOI	“When information contained on websites is relied on, the Decision File should contain a contemporaneous copy of the website, including the address and date that it was downloaded, to ensure that the information relied on is preserved before the web site content changes.” <sup>52</sup>
EPA	Decision files should include “hard copy printouts of any website information that is cited in the decision or relied on.” <sup>53</sup>
NOAA	“When NOAA takes information contained on websites into account in making the decision, the Administrative Record must contain a hard copy of the information presented on the relevant web pages, including the internet address (URL) and date that it was downloaded, to ensure that the information relied on is preserved in the event the web site content changes.” <sup>54</sup>

### **Digital Data Files and Databases**

Rulemaking personnel may encounter a variety of data file and database formats, including Excel, Microsoft Access, comma-separated values files (CSV), extensible markup language databases (XML), and others.<sup>55</sup> Each format has its own strengths and weaknesses. Agencies may wish to provide instructions on how personnel should prepare data for rulemaking records (e.g., transmitting data in their original format or converting data files to a standardized format such as CSV or XML).

### **Computer Models and Data Analysis Programs**

Rulemaking personnel may rely on computer models and other data analysis programs when developing rules.<sup>56</sup> Beck found in 2013 that “[m]any agencies do not have standard practices for handling such resources, but rather consult internally on this type of issue on a case-by-case basis.”<sup>57</sup> He notes that “[m]ore robust electronic information management systems may be able to store models, for example, as a digital file, with a record of data used by the model at a

<sup>51</sup> See EPA Guidance, *supra* note 4, 8; NOAA Guidance, *supra* note 7, at 8.

<sup>52</sup> DOI Guidance, *supra* note 3, at 4.

<sup>53</sup> EPA Guidance, *supra* note 4, at 8.

<sup>54</sup> NOAA Guidance, *supra* note 7, at 8.

<sup>55</sup> See DOI Guidance, *supra* note 3, at 6; EPA Guidance, *supra* note 4, at 7; NOAA Guidance, *supra* note 7, at 7.

<sup>56</sup> EPA Guidance, *supra* note 4, at 7; NOAA Guidance, *supra* note 7, at 7.

<sup>57</sup> Beck, *supra* note 2, at 50.

particular point in time and a system to track changes in model data.”<sup>58</sup> Agencies that frequently rely on computer models and other data analysis programs for rulemaking purposes may wish to address whether and how personnel should prepare such materials for rulemaking records.

### Emails

Because of email’s “extensive use” as “an important means of communication,” some agency policies give “special attention” to preserving email messages. Agencies may wish to address how personnel should prepare emails for rulemaking records. In particular, agencies may wish to consider:

- the form in which to preserve emails (e.g., in their original file format (MSG files for Microsoft Outlook users), in a standardized file format such as PDF);
- how to handle attachments to emails (e.g. instructing personnel to file a document with attachments “with the attachments as a primary document”);<sup>59</sup>
- how to handle email chains (i.e., the original message and all replies and related messages);<sup>60</sup> and
- how to handle emails which contain commingled agency and personal information.<sup>61</sup>

Some agencies also explicitly encourage personnel to “use care in drafting and sending emails”<sup>62</sup> or “give careful consideration to the content of emails they draft and send.”<sup>63</sup>

<b>Agency</b>	<b>Guidance</b>
DOI	“ <i>Confusing chain messages.</i> Ideally, employees should use care in drafting and sending emails to avoid later confusion in interpreting the chain of communication. Emails with numerous attachments or that contain a commingling of personal and agency information and email chains with multiple parties and topics can lead to confusion and misinterpretation of the intended communication, especially when a long period of time has passed and the reader is less familiar with the subject matter. It may be difficult for an outside party, such as a court, to determine the actual context of an email or portion of an email without relevant attachments or all the emails in a chain. When several separate responses are sent in reply to one original message, the original message should remain attached to each of the responses.” <sup>64</sup>
NOAA	“Because of the extensive use of email now, email deserves special attention. Email is an important means of communication. However, email itself is merely a medium, and it is not the best way to document agency decisionmaking. Often an email will contain only the personal opinion or

<sup>58</sup> *Id.*

<sup>59</sup> Beck, *supra* note 2, at 45.

<sup>60</sup> DOI Guidance, *supra* note 3, at 9.

<sup>61</sup> *Id.*

<sup>62</sup> DOI Guidance, *supra* note 3, at 4.

<sup>63</sup> NOAA Guidance, *supra* note 7, at 15.

<sup>64</sup> *Id.* at 9.

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analysis of an individual employee that may or may not accurately reflect the position or analysis of the agency. An email may also contain preliminary conclusions, thoughts, and opinions based on incomplete information. For these reasons, agency employees should give careful consideration to the content of emails they draft and send.”<sup>65</sup>

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Finally, agencies should consider whether it is a best practice for staff to prepare memoranda to the record to document important and potentially confusing email chains. If so, policies should explain the information such memoranda should include (e.g., author, date prepared) and any process for their approval.

<b>Agency</b>	<b>Guidance</b>
DOI	“Contemporaneous memoranda that document . . . confusing emails . . . should be written or collected and placed in the Decision File.” <sup>66</sup> “Examples of relevant, supporting documents include . . . [m]emoranda to the file, created contemporaneously to the creation of the document, that further explain the content of relevant electronic communications and their attachments.” <sup>67</sup>
NOAA	“[A] best practice is that if an internal email is the exclusive source of particular facts or data that are relevant decision, the sender of the email should incorporate the information in a signed and dated memorandum to be placed in the file.” <sup>68</sup> “To the extent that NOAA employees elect to draft a memorandum to the file, best practice is to provide any such memorandum to an agency manager within the decision-making chain to ensure that the facts, analysis, or points of view contained in the memorandum are properly considered during the decision-making process.” <sup>69</sup> Memoranda must be signed and dated. <sup>70</sup>

### **Personal Notes**

Many of the same principles that apply to emails will also apply to personal notes, including principles regarding the preparation of memoranda to the record.<sup>71</sup> However, agencies may wish to consider providing instructions for preparing handwritten notes for rulemaking records such as digitization or conversion to machine-readable documents.

### **Audiovisual Materials**

Digital audiovisual materials come in a variety of file formats, including MP3, MP4, WAV, WMV, MPG, and others. Each format has its own strengths and weaknesses. Some

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<sup>65</sup> NOAA Guidance, *supra* note 7, at 15.

<sup>66</sup> DOI Guidance, *supra* note 3, at 4.

<sup>67</sup> *Id.* at 6.

<sup>68</sup> NOAA Guidance, *supra* note 7, at 15.

<sup>69</sup> *Id.* at 14.

<sup>70</sup> *Id.* at 15.

<sup>71</sup> See DOI Guidance, *supra* note 3, at 8–10; EPA Guidance, *supra* note 4, at 9; IRS Guidance, *supra* note 6, § 32.1.2.1; NOAA Guidance, *supra* note 7, at 9.

agency personnel may also use legacy analog technologies such as cassette tapes. Agencies may wish to address how personnel should prepare audiovisual materials for rulemaking records (e.g. transmitting files in their original format, digitizing analog audiovisual materials, or converting digital files to a standardized format).

### Oral Communications

Oral communications can be internal to an agency or between agency personnel and external entities. They can also be planned or spontaneous. Agencies may wish to encourage personnel to record or transcribe planned, external oral communications—especially relatively formal events such as public hearings, agency proceedings, advisory committee meetings, and listening sessions. Minutes or summaries may serve the same purpose.

Agency	Guidance
DOI	“Substantive meetings that are relevant to the decision-making process should be sufficiently documented.” <sup>72</sup> “Examples of relevant, supporting documents include . . . [m]inutes, transcripts of meetings, . . . .” <sup>73</sup> “If an employee takes relevant handwritten notes at a meeting and later gives copies of his or her notes to colleagues who were unable to attend the meeting, the notes should be included in an AR if there is no other documentation of the meeting.” <sup>74</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: . . . transcripts from hearings . . . .” <sup>75</sup>
FDA	The “record of the administrative proceeding” includes “transcripts” and “minutes of meetings.” <sup>76</sup>
NOAA	“The following documents must, to the extent applicable, be included in every agency Administrative Record: . . . Transcripts, minutes, or summaries of meetings with members of the public to discuss the agency’s proposed action as well as any recorded minutes of those meetings.”

Agencies should also consider whether it is a best practice to encourage staff to prepare memoranda to the record to document important oral communications that were not recorded or transcribed. If so, policies should explain the information such memoranda should include (e.g., author, date prepared) and any process for their approval.

Agency	Guidance
DOI	“Substantive meetings that are relevant to the decision-making process should be sufficiently documented.” <sup>77</sup> “Examples of relevant, supporting documents include . . . other memorializations of telephone conversations and meetings, including personal memoranda or handwritten notes that were circulated to

<sup>72</sup> DOI Guidance, *supra* note 3, at 4.

<sup>73</sup> *Id.* at 6-7; *accord* Goldfrank, *supra* note 9, at 9.

<sup>74</sup> *Id.* at 9-10.

<sup>75</sup> EPA Guidance, *supra* note 4, at 8.

<sup>76</sup> 21 C.F.R. § 10.40(g)(6).

<sup>77</sup> DOI Guidance, *supra* note 3, at 4.

	colleagues or added to the Decision File.” <sup>78</sup> “Contemporaneous memoranda that document relevant oral communications . . . should be written or collected and placed in the Decision File.” <sup>79</sup> “Examples of relevant, supporting documents include . . . [m]emoranda to the file, created contemporaneously to the creation of the document, that further explain the content of relevant . . . meetings, and phone conversations.” <sup>80</sup> “[I]n those situations where a personal memorialization is the only evidence that a relevant meeting occurred or contains substantive evidence relevant to the decision-making process, it may be necessary to include a personal memorialization in an AR.” <sup>81</sup>
EPA	“Following are the major categories of materials that should be in decision records filed in court challenges to those decisions: EPA information considered in connection with the decision, including: . . . official meeting notes or transcripts . . . documents generated by EPA that memorialize phone calls that provided relevant factual information or public comments not otherwise provided in written form . . .” <sup>82</sup>
IRS	The legal file should contain “[r]ecords of any meetings with members of the public, including a list of attendees and the date, time, and place of the meeting; any documents received; and notes taken during the meetings.” <sup>83</sup>

As the Working Group has previously discussed,<sup>84</sup> agencies may also wish to discourage personnel from engaging in ex parte communications or direct personnel to follow specific steps to document ex parte communications and encourage outside entities to follow up with public comments. ACUS Recommendation 2014-4, “*Ex Parte*” *Communications in Informal Rulemaking* offers helpful principles.<sup>85</sup>

### Objects

Rulemaking personnel may encounter physical objects that they cannot easily digitize or add to a paper folder. Beck notes, for example, that Occupational Safety and Health Administration personnel sometimes consider safety products, such as respirators, during rulemakings.<sup>86</sup> A best practice may be to include a description or a photograph of such objects in the rulemaking record.<sup>87</sup> Agencies may also wish to address how custodians should store and safeguard physical objects that they make part of rulemaking records.

<sup>78</sup> *Id.* at 6-7; accord Goldfrank, *supra* note 9, at 9.

<sup>79</sup> *Id.*

<sup>80</sup> DOI Guidance, *supra* note 3, at 6.

<sup>81</sup> *Id.* at 9-10.

<sup>82</sup> *Id.* at 8.

<sup>83</sup> IRS Guidance, *supra* note 6, § 32.1.2.1.

<sup>84</sup> See Jan. 15 Report, *supra* note 14; Oct. 29 Report, *supra* note 13, at 9.

<sup>85</sup> Admin. Conf. of the U.S., Recommendation 2014-4, “*Ex Parte*” *Communications in Informal Rulemaking*, 79 Fed. Reg. 35,993 (June 25, 2014).

<sup>86</sup> Beck, *supra* note 2, at 45.

<sup>87</sup> *Id.*; cf. Recommendation 2011-1, *supra* note 44, ¶ 5.

## Internal Workflow Materials

Rulemaking personnel may rely on electronic workflow management systems to exchange rulemaking materials and generally manage the rulemaking process.<sup>88</sup> In 2013, Department of Veterans Affairs officials “suggested that a significant problem may exist with converting solely to a single electronic file format those working materials that are compiled through diverse information query (IQ) systems.”<sup>89</sup> Beck notes that agency systems likely vary in their capacity to generate files that can easily be added to rulemaking records.<sup>90</sup> Agencies that expect personnel to add workflow management materials to rulemaking records may wish to provide specific instructions in policies on compiling administrative records.

<b>Agency</b>	<b>Guidance</b>
IRS	The legal file should contain “[a] copy of the CASE-MIS control screen.” <sup>91</sup>

### SUBMITTING RULEMAKING MATERIALS TO THE RECORD CUSTODIAN

Once rulemaking personnel have identified a material and prepared it for inclusion in the rulemaking record, they must take steps to add it to the record. Agencies may wish to address the process personnel should use to transmit rulemaking materials to the record custodian or otherwise add them to the rulemaking record. Options may include:

- personnel should email rulemaking materials to the record custodian;
- personnel should save rulemaking materials to a shared folder to which the custodian has access;<sup>92</sup>
- personnel should upload rulemaking materials directly to a specialized electronic recordkeeping platform; and
- personnel should bring physical objects

There is almost certainly significant variation in the practices by which agency personnel submit rulemaking materials to record custodians. Factors that may account for this variation may include the allocation of responsibilities between rulemaking personnel and record custodians; the organizational location of custodians in relation to rulemaking personnel; the involvement of custodians in substantive rulemaking activities; the types of materials rulemaking personnel routinely encounter; and the nature of the rulemaking recordkeeping system itself.

### LABELING RULEMAKING RECORD MATERIALS

To ensure that users can easily identify rulemaking materials and understand their context, custodians may need to ensure that “[a]ll documents placed in the Decision File [are] appropriately labeled and dated.”<sup>93</sup> Depending on the record’s format and use by other personnel,

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<sup>88</sup> Beck, *supra* note 2, at 45.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> IRS Guidance, *supra* note 6, § 32.1.2.1.

<sup>92</sup> Beck, *supra* note 2, at 45.

<sup>93</sup> DOI Guidance, *supra* note 3, at 4.

labeling tasks may include adding page numbers to rulemaking materials and recording significant metadata such a unique identifier for each record item.<sup>94</sup>

Custodians are often charged not only with maintaining rulemaking materials but with documenting the recordkeeping process. To accomplish this task, custodians may need to compile metadata about the compilation process, including details about the person who submitted each item (e.g., name, title, office) and the submission date.

Agencies may be able to automate many of these tasks.<sup>95</sup> Where automation is unavailable or impractical, agencies may wish to train record custodians to label materials and collect metadata throughout the rulemaking process.

### **ORGANIZING THE RULEMAKING RECORD**

Several existing agency policies include instructions on organizing the administrative record for judicial review. For example, NOAA Guidance directs personnel to organize the administrative record “in a logical and accessible way so that someone unfamiliar with the issue can find specific documents quickly.” While the Guidance permits any “logical” organization, it suggests compiling materials “by chronological order, topic, or by agency in a multi-agency decision.” It also suggests dividing materials “into several topics, perhaps based on the topics of various primary documents at issue, and chronologically organized within each topic.”<sup>96</sup>

Organization may not be as important with respect to rulemaking records, which are internal compendia and perhaps less formal. Nevertheless, several agencies do appear to index rulemaking records as they are developed.<sup>97</sup> DOI Guidance, for example, directs personnel to organize the rulemaking record “in a logical manner, such as chronologically or by topic, so that documents can be added to the Decision File as they are generated or received.”<sup>98</sup> Other agencies may wish to include instructions or best practices for organizing the rulemaking record. As with labeling, agencies may be able to automate indexing.

### **INDEXING THE RULEMAKING RECORD**

Several existing agency policies include instructions on organizing the administrative record for judicial review. As with organization, indexing may be less important for rulemaking records, which are internal, comparatively informal, and under continuous development throughout the rulemaking process. As with labeling and organization, electronic recordkeeping may obviate the need for custodians to actively index materials during the rulemaking process.<sup>99</sup>

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<sup>94</sup> Cf. NOAA Guidance, *supra* note 7, at 12.

<sup>95</sup> See Beck, *supra* note 2, at 45–46.

<sup>96</sup> NOAA Guidance, *supra* note 7, at 12.

<sup>97</sup> Beck, *supra* note 2, at 46.

<sup>98</sup> DOI Guidance, *supra* note 3, at 4.

<sup>99</sup> See Beck, *supra* note 2, at 45.

## **SEGREGATING SENSITIVE INFORMATION**

ACUS recommends that agencies direct personnel to “deposit rulemaking record materials with the [designated] custodian(s), excepting if necessary confidential information to which access is restricted.”<sup>100</sup> Custodians who have credentials to access confidential and other highly sensitive information may need to take steps to segregate or limit access to materials that contain such information. When custodians lack credentials to access confidential or other highly sensitive information, agencies may need to develop alternative recordkeeping processes for information that contain such information. Agencies may wish to address these questions in policies on compiling administrative records.

## **CLOSING THE RULEMAKING RECORD**

As discussed at the Working Group’s first meeting, the rulemaking record ordinarily closes once the agency has made a final decision (e.g., issues a final rule or withdraws a proposed rule).<sup>101</sup> The record custodian may be responsible for closing the rulemaking record (e.g., locking an electronic file or changing edit permissions on a shared drive) and alerting rulemaking personnel that, in general, they should no longer prepare materials for inclusion in the rulemaking record.<sup>102</sup> Agencies may wish to clarify that the rulemaking record closes at the time of the agency’s decision and explain any steps involved in closing the record.

## **PRESERVING THE RULEMAKING RECORD**

Agencies may wish to explain how record custodians should preserve and store the rulemaking record after the agency has made its final decision (e.g., issues a final rule or withdraws a proposed rule). Topics to consider may include:

- Moving a shared drive, SharePoint library, or other informal, electronic rulemaking record to a designated location for long-term storage;
- Moving non-electronic records, including any physical objects, to a designated location for long-term storage.

Agencies may wish to consider how to preserve a rulemaking record in the period immediately following adoption of a final rule and how to preserve a rulemaking record after the period in which litigation is likely. Other government-wide and agency-specific recordkeeping policies may also be relevant.

## **QUESTIONS FOR THE WORKING GROUP**

### ***Designating the Record Custodian***

- (1) What are the responsibilities of a record custodian? Are there any tasks beyond those listed on pages 3–4 that custodians should perform? Are there any listed tasks that

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<sup>100</sup> Recommendation 2013-4, *supra* note 12, ¶ 5.

<sup>101</sup> See generally Oct. 29 Report, *supra* note 13, at 10–11.

<sup>102</sup> *Id.*

custodians should not perform?

- (2) What qualifications will the ideal record custodian have? Are there any qualifications beyond those listed on page 4 that custodians should have? Are there any listed qualifications that may be less important than others?
- (3) As a general matter, should agencies locate custodians in a centralized recordkeeping office, or should an employee in the office developing the rule serve as custodian? What are the pros and cons of each approach? Are there factors agencies should consider when selecting between the two approaches or adopting a hybrid approach?
- (4) Should agencies leave it to subcomponents to develop their own custodian policies?

### ***Creating and Maintaining the Rulemaking Record***

- (5) What factors should agencies consider when selecting a recordkeeping tool? Are there any facts agencies should consider beyond those listed on page 6? Are any of the listed factors unimportant or inappropriate?
- (6) To what extent should agencies use electronic recordkeeping tools to compile and maintain rulemaking records?
- (7) Which kinds of electronic systems should agencies consider when selecting a recordkeeping tool? What factors should agencies consider when selecting among available electronic systems?
- (8) Which agency officials and staff should be involved in selecting or developing an electronic recordkeeping tool?
- (9) Are there any off-the-shelf tools agencies should consider adopting?

### ***Preparing Materials for the Rulemaking Record***

- (10) Should agency policies provide specific instructions on preparing certain categories of materials for inclusion in rulemaking records?
- (11) If so, which categories should agency policies address? Are there any categories beyond those listed on page 7 that agencies should consider addressing? Are there any listed categories for which agencies should not provide specific instructions?
- (12) Are there best practices for balancing: (a) the kind of detailed instructions which may help personnel to efficiently, accurately, and consistently compile rulemaking records, and (b) the desire to develop long-term, more “evergreen” policies that would allow for technological advances?

- (13) Are there best practices related to each of the specific categories listed on page 7 (and described in detail on pages 7–14) and any others the Working Group identifies?
- (14) Are there best practices for preparing memoranda to the record?
- (15) Are there best practices for documenting ex parte communications in rulemaking records?

#### ***Submitting Materials to the Rulemaking Record***

- (16) Are there best practices with respect to the process by which agency personnel submit rulemaking materials to the record custodian? For example, should agencies adopt systems which allow rulemaking personnel to independently add materials to the rulemaking record? What factors should agencies consider when they develop a process for submitting rulemaking materials?

#### ***Labeling Rulemaking Record Materials***

- (17) Are there best practices for labeling rulemaking materials? What metadata should agencies consider associating with rulemaking materials?

#### ***Organizing the Rulemaking Record***

- (18) Is it necessary for agencies to maintain organized rulemaking records throughout the rulemaking process?
- (19) If so, are there best practices for organizing the rulemaking record?

#### ***Indexing the Rulemaking Record***

- (20) Is it necessary for agencies to index rulemaking records throughout the rulemaking process?
- (21) If so, are there best practices for indexing the rulemaking record?

#### ***Segregating Sensitive Information in the Rulemaking Record***

- (22) For agencies that routinely handle confidential or other highly sensitive information, should agencies select custodians who have permission to access that information?
- (23) If so, are there best practices for handling confidential or other highly sensitive information?
- (24) If not, should the agency develop an alternative recordkeeping process for compiling confidential or other highly sensitive information? Are there any best practices agencies should consider when developing such a process?

### ***Closing the Rulemaking Record***

- (25) What steps should the custodian take to close the rulemaking record?

### ***Preserving the Rulemaking Record***

- (26) How should the custodian preserve the rulemaking record in the period immediately following adoption of a final rule, when litigation is most likely?
- (27) What steps should the custodian take to preserve the rulemaking record on a long-term basis or when litigation is unlikely?

### ***Other Topics***

- (28) Are there any other topics related to the mechanics of compiling a rulemaking record that agencies should consider or should consider addressing in policies on compiling administrative records?